IN RE: PROPOSED AMENDMENT OT RULE 1.15, ARKANSAS RULES OF PROFESSIONAL CONDUCT, AND ENABLING POWERS FOR THE ARKANSAS IOLTA FOUNDATION, INC.

06-625 ___ S.W.3d ___

Supreme Court of Arkansas
Opinion delivered June 29, 2006

PER CURIAM. The Arkansas IOLTA Foundation, Inc., has filed a petition with the court proposing to revise Rule 1.15 of the Arkansas Rules of Professional Conduct and seeking certain powers for the IOLTA Board of Directors. The objectives of the proposed amendments are summarized in Paragraph III of the Petition:

> The changes proposed in this Petition relate primarily to a wider variety of new banking products ... to the types of financial institutions that may hold IOLTA accounts, and to certain banking practices ... that negatively impact attorney IOLTA revenue. In addition, the Petition seeks enabling powers for the Foundations's Board.

With respect to the Board's powers, the proposal seeks to "delineate the Board's authority to monitor and enforce the Rule." (Paragraph IX)

These powers would include determining what are low interest rates, what are unreasonable

charges, and the authority to decertify banks that pay low interest rates or charge unreasonable fees or do not apply a standard of comparability to IOLTA account and non-IOLTA accounts. These powers would also include evaluating and approving new banking product for IOLTA accounts as they become available. Finally, these powers would include analyzing banking practices and prohibiting those that significantly diminish IOLTA revenue when these practices are not applied to non-IOLTA accounts with similar balances.

(Paragraph IX)

The petition and proposed rule (with changes noted) are reproduced below, and the Petitioner's position is more fully explained therein. We publish them for comment from the bench and bar. The comment period shall expire October 1, 2006.

Comments should be in writing and addressed as follows: Clerk, Arkansas Supreme Court, Attention *IOLTA -- Rule 1.15*, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS IOLTA FOUNDATION, INC. **PETITIONER**

IN RE: MODEL RULE OF PROFESSIONAL

PER CURIAM - 10

CONDUCT 1.15 AND ENABLING

POWERS FOR THE FOUNDATION

PETITION TO REVISE RULE 1.15

The Arkansas IOLTA Foundation, Inc., acting through its Board President, Mr. Larry E. Kircher, and its Board Chair of the Long-Range Planning Committee, Mr. Frank Sewall, and Board and Committee Member, Mr. Nate Coulter, with specific direction by vote of its Board of Directors, and in an effort to assist the Court in discharging its responsibility under Amendment 28 to the Constitution of the State of Arkansas to regulate the practice of law, petitions the Supreme Court of Arkansas to revise Arkansas Rule 1.15 of Professional Conduct by replacing it with the proposed revision which is attached as Exhibit A.

I.

In 1984 the Arkansas Supreme Court approved a petition brought by the Arkansas Bar Association to establish a voluntary IOLTA program in Arkansas. Subsequently the Court has amended the Rule from time to time.

II.

In 1994 the Arkansas IOLTA Foundation, Inc. petitioned the Court to modify Rule 1.15 to change participation in the Arkansas Interest-on-Lawyers'-Trust Accounts program from voluntary to comprehensive. The change was sought to increase revenue for the Foundation's mission:

- For legal aid to the poor;
- For student loans and scholarships;
- For improvement of the administration of justice; and
- For such other purposes as the Court may from time to time approve and as meet the qualifications of the Court's Order.

The Arkansas Supreme Court approved this petition on October 17, 1994 to be effective on January 1, 1995.

III.

The changes proposed in this Petition relate primarily to a wider variety of new banking products (such as sweep and money market accounts), to the types of financial institutions that may hold IOLTA accounts, and to certain banking practices—such as negative netting—that negatively impact attorney IOLTA revenue. In addition, the Petition seeks enabling powers for the Foundation's Board.

IV.

The current version of the Rule reflects products promoted by banks during the eighties and nineties. This Petition seeks to make technical changes that reflect current banking products and practices that offer attorneys a wider variety of investment choices and that may increase attorney IOLTA revenue. For example, under the current Rule attorneys may use only NOW or SuperNOW checking accounts for their IOLTA accounts at banks, savings and loan associations, or credit unions. These checking accounts are among the lowest-interest-paying bank products now on the market. In addition to these checking accounts, the proposed changes would permit money market funds, sweep accounts, and overnight repurchase agreements as choices that attorneys may select for their IOLTA accounts. While these banking products are subject to credit risks, the risks are commonly accepted by banks themselves when investing their own funds for higher return rates. Additionally,

attorneys would have the option of working with investment companies as well as banks, credit unions, and savings and loan associations.

V.

The current rule also reflects banking practices common in the eighties and nineties, when banks served primarily the county in which they maintained their head offices. Practices have changed with the advent of statewide and regional banking. Some regional banks have a practice of negative netting, i.e., fees or charges in excess of the interest earned on one account are taken from the interest earned on other IOLTA accounts at that bank. This diminishes attorney IOLTA revenue.

Another problematic area concerns the current Rule's use of language that requires interest paid on IOLTA accounts to be the same as that paid to non-lawyer customers "on accounts of the same class within the same institution." Some banks have designated IOLTA accounts as a separate class of accounts and assigned an interest rate to them as a class within the bank. Proposed replacement language focuses on comparability: the highest interest rate paid to non-IOLTA account holders must also be paid by the institution to its IOLTA account-holders when IOLTA account balances meet or exceed the same minimum balance as the non-IOLTA account. An example of comparability is this: an Arkansas attorney has an IOLTA account with an

average daily collected balance of more than $250,000. A NOW checking account earns interest of 0.08%. No doubt there is a non-IOLTA account at the same bank with the same average daily collected balance but earning more than 0.08% interest because the account is held in a different investment vehicle negotiated between the banker and the non-IOLTA account holder when the account was opened.

VI.

Several states have implemented rule changes consistent with those being proposed in Exhibit A. These states—Alabama, Florida, Michigan, and Texas—have reported increased attorney IOLTA revenue, although the reports are tempered by the fact that interest rates have also increased slightly and it is difficult to pinpoint precise results tied to the rule changes. These states also report that attorneys have reacted favorably to the increased range of bank products available to them for their IOLTA accounts.

VII.

The Arkansas IOLTA Foundation, Inc. determined to study these rule changes and evaluate their appropriateness for the Arkansas program. Mr. Larry E. Kircher, President of the Board, appointed a special subcommittee to assist the Long-Range Planning Committee in evaluating and discussing these proposed changes. The Board

felt that significant banking representation should be included to assist with new banking processes and product information. The following people worked to evaluate and recommend these rule changes: Mr. Frank B. Sewall, attorney and Chair of the Board's Long-Range Planning Committee; Mr. Earnest E. Brown, Jr., attorney and Board member; Mr. Nate Coulter, attorney and Board member; Mr. James D. Gingerich, attorney and liaison from the Administrative Office of the Courts; Mr. Don Hollingsworth, attorney and liaison and Executive Director, Arkansas Bar Association; Mr. Larry E. Kircher, Board President and President, Citizens State Bank, Bald Knob; Mr. John Monroe, Metropolitan National Bank; Mr. Robert Plummer, Pulaski Trust & Raymond James; Mr. Steven C. Wade, Simmons First National Bank; and Ms. Susie Pointer, the Foundation's Executive Director.

These committee members reviewed rule changes in Alabama, Florida, Michigan and Texas. The committee members and the Foundation Board believe that the proposed changes now before the Court will result in a wider range of financial services and products for the convenience of attorneys and bankers and may result in increased revenue for the Arkansas IOLTA program.

VIII.

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A redlined version of Rule 1.15, showing how the current Rule would be changed if the Court adopts the proposed recommendations is attached as Exhibit A.

IX.

Because of the ongoing relationship of the IOLTA Foundation with banks and attorneys established by Rule 1.15, the Board of the Foundation requests that the Court delineate the Board's authority to monitor and enforce the Rule. For example, if a bank fails to comply with the comparability interest rate requirement or charges what the Board believes to be an unreasonable fee, the Board is uncertain that it has the authority to decertify that bank from participation in the IOLTA program. Similarly, with regard to the language mentioned earlier—"on accounts of the same class within the same institution"—it is not clear whether the Board has the authority to direct the bank to discontinue the practice or end its participation in the IOLTA program. In its Per Curiam Order of September 17, 1984, at Finding 6, the Court created a new nonprofit corporation with a Board of Directors to receive the interest from IOLTA accounts and to distribute the income according to the four categories set out on page 2 of this Petition. The Board of the Foundation petitions the Court to amend its original Per Curiam Order to give specific enabling powers to the Foundation's Board to perform work necessary to monitor and enforce compliance with Rule 1.15. These powers would include determining what are low interest rates, what are unreasonable charges, and the authority to decertify banks that pay low interest rates or charge unreasonable

fees or do not apply a standard of comparability to IOLTA accounts and non-IOLTA accounts. These powers would also include evaluating and approving new banking products for IOLTA accounts as they become available. Finally, these powers would include analyzing banking practices and prohibiting those that significantly diminish IOLTA revenue when these practices are not applied to non-IOLTA accounts with similar balances.

X.

The Arkansas IOLTA Foundation, Inc., through its Board of Directors, now requests:

1. The Court provide an opportunity for input from the public and the profession on the proposed changes to Rule 1.15.
2. The Court review and evaluate the proposed changes to Rule 1.15, the comments received from the profession and the public, and review any other information that the Court deems useful.
3. Substitute the proposed Rule 1.15 for the current Rule 1.15.

4. The Court amend its original Per Curiam Order to grant such enabling powers as it deems fit to the Board of the Foundation to perform work necessary to monitor and enforce compliance with Rule 1.15.

XI.

The Arkansas IOLTA Foundation, Inc. petitions the Court for adoption of this Petition.

Respectfully submitted:

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Larry E. Kircher, President, Arkansas IOLTA Foundation, Inc.
President, Citizens State Bank, Bald Knob

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Frank B. Sewall, Attorney and Chair, Long-Range Planning Committee

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Nate Coulter, Attorney and Board and LRP Committee Member

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Language to be removed is struck through; new language is underlined.

EXHIBIT A

RULE 1.15. SAFEKEEPING PROPERTY AND TRUST ACCOUNTS

DEFINITIONS. As used in this rule, the terms below shall have the following meaning:

"IOLTA account" means an interest- or dividend-bearing trust account benefitting the Arkansas IOLTA Foundation, Inc. established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons, which may be withdrawn upon request as soon as permitted by law.

"Eligible institution" for IOLTA accounts means a depository bank or savings and loan association or credit union authorized by federal or state laws to do business in Arkansas, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Arkansas. In addition, an eligible institution must either (1) maintain a physical office in the state of Arkansas or (2) be owned by a bank holding company regulated by the Federal Reserve System, of which a subsidiary federally-insured depository bank or savings and loan association or credit union maintains a physical office in the state of Arkansas. Eligible institutions must meet the requirements set out in section (b) below.

"Interest- or dividend-bearing trust account" means a federally insured checking account or an investment product, including a sweep product and a daily (overnight) financial-institution repurchase agreement or an open-end money market fund. A daily financial-institution repurchase agreement must be fully collatralized by U.S. Government Securities; an open-end money-market fund must invest primarily in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and, at the time of investment, have total managed assets of at least $250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

"Allowable reasonable fees" means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee.

"U.S. Treasury securities" means direct obligations of the federal government of the United States.

"Repurchase agreements" means transactions in which a fund buys a security from a dealer or bank and agrees to sell the security back at a mutually agreed-upon time and price. The repurchase price exceeds the sale price, reflecting the fund's return on the

transaction. This return is unrelated to the interest rate on the underlying security. Repurchase agreements are subject to credit risks.

(a) **Safekeeping property.**

(1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.

(3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.

(4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.

(5) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person in writing. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property to the client or third persons.

(6) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(b) **Trust Accounts: IOLTA trust accounts and non-IOLTA trust accounts.**

(1) Funds of a client shall be deposited and maintained in one or more separate, clearly identifiable trust accounts in the state where the lawyer's office is

situated, or elsewhere with the consent of the client or third person.

(2) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed $500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

(4) Each trust account referred to in section (b)(1) shall be an IOLTA account held at an eligible institution.

~~(4) Each trust account referred to in section (b) (1) shall be an interest-bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company, and the institution shall be insured by an agency of the federal government.~~

(5) Each such trust account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust account ("IOLTA" account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1) -(b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.

~~(iii) The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include any items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.~~

(7) Participation in the IOLTA program is voluntary for banks, savings and loan associations, and investment companies. Any eligible institution that elects to provide and maintain IOLTA accounts shall do so according to the following terms:

(i) Determination of Interest Rates and Dividends. Eligible institutions that maintain IOLTA accounts that are, or are invested in, interest-bearing deposits or daily financial-institution repurchase agreements shall pay no less than the highest rate and dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the balance in the IOLTA

account, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer may accept, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account into a daily financial institution repurchase agreement or a money-market fund. However, this Rule shall not require any eligible institution to offer or otherwise make available sweep accounts for IOLTA accounts.

(ii) Written Agreements. There shall be a written agreement between the lawyer and the eligible institution, designating interest on the IOLTA account be remitted to the Arkansas IOLTA Foundation, Inc. on a monthly basis.

(iii) Interest Rates and Dividends. Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(iv) Reasonable Fees. Reasonable fees means (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balances, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee. Reasonable fees are the only service charges or fees permitted to be deducted from interest earned on IOLTA accounts. Reasonable fees may be deducted from interest on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for all of its customers with interest-bearing accounts. All other fees and charges shall not be assessed against the accrued interest on the IOLTA account but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

(v) Negative Netting Prohibited. Fees or charges in excess of the interest earned on the account for any month shall not be taken from interest earned on other IOLTA accounts or from the principal of the account.

(vi) Reporting Requirements. A statement should be transmitted monthly to the Arkansas IOLTA Foundation, Inc. with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the average daily rate applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period. The Foundation supplies a monthly remittance form tailored to each bank listing the required information; however, should the bank elect to generate its own report, the requirements in this section must be addressed.

(8) All client funds shall be deposited in the account specified in section (b)(6), unless they are deposited in a separate interest-bearing account ("non-IOLTA" account) for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular client matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in this Rule.

~~(8) The interest paid on the account shall not be less than, nor the fees and charges assessed greater than, the rate paid or fees and charges assessed, to any non-lawyer customers on accounts of the same class within the same institution.~~

(9) The decision whether to use an "IOLTA" account specified in section (b)(6) or a "non-IOLTA" account specified in section (b)(8) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

(i) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

(ii) The cost of establishing and administering the account, including the cost of the lawyer's or law firm's services.

(10) ~~All lawyers who maintain accounts provided for in this Rule, must convert their~~

~~client trust account(s) to interest-bearing account(s) with the interest to be paid to the Arkansas IOLTA Foundation, Inc. no later than six months from the date of the order adopting this Rule, unless the account falls within subsection (b)(8).~~ Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule. All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(11) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on a form provided by and in a manner designated by the Clerk of the Supreme Court.

(12) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.

COMMENT:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the trust account funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fee owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account

and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed of the funds shall be promptly distributed.

[4] Paragraph (a)(6) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

PER CURIAM - 10